United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-6012

TO BE ARGUED
ANTHONY B. CATALDO

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

ANTHONY B. CATALDO, and
ADA W. CATALDO,

Plaintiffs,

-against-

UNITED STATES OF AMERICA,

Defendant.

- - - - - - - -

In the Matter of ANTHONY B. CATALDO,
an attorney,

Appellant.

- -X

DOCKET NO.
75-6012

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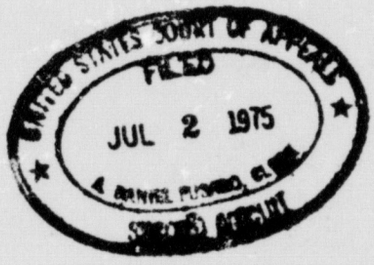
APPELLANT'S BRIEF AND APPENDIX



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CASES, STATUTES AND AUTHORITIES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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ANTHONY B. CATALDO, and
ADA W. CATALDO, :

Plaintiffs, :

-against- :

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In the Matter of ANTHONY B. CATALDO, an attorney :

Appellant. :

- -X

DOCKET NO.
75-6012

APPELLANT'S BRIEF

QUESTIONS INVOLVED

1. Where trial counsel was held for contempt after the conclusion of the trial without a hearing and without specifications of the contemptuous actions charged against him, was the order entered a valid order of contempt.

2. Was any act of the same trial counsel on the trial contemptuous of the court.

STATEMENT OF THE CASE

This is an appeal from the order of May 18, 1973 by the Hon. Richard H. Levet, holding appellant while acting as trial counsel for himself and his wife who as plaintiffs were suing to recover monies unlawfully collected under an arbitrary assessment for additional income taxes for 1963.

This is the third attempt to have this court consider the merits of appellant's claim of error and unlawfulness in holding him for contempt. The prior two occasions

ended in a refusal to pass upon the merits, the first for an alleged lack of jurisdiction, and the second because the order of contempt was not before the court on the appeal that had been taken. Both those decisions were placed upon the fact that the notice of appeal in each did not recite that the order of contempt was being appealed. The notice of appeal on this occasion recites the order of contempt as the order appealed from. The alleged lack of jurisdiction on the first occasion was when appellant argued the unlawfulness of the order as an incident within the appeal from the final judgment in the civil suit that was tried by Judge Levet. On that appeal this court said that the order of contempt was a criminal judgment and that a separate appeal had to be taken from that criminal judgment, but as it was not, the matter was not before the court.

The order now appealed from was entered in the Civil Docket at the pages reciting the proceeding in the civil action for the recovery of illegally collected monies. It has never been entered in the criminal docket and it is even now not entered in the criminal docket. Rule 4 (b) of the Rules of Appellate Procedure states that the time to file appeals in Criminal matters is 10 days from the entry of the judgment or order in the criminal docket and if not so entered then the time is counted from the date when the notice of appeal was filed. Hence, this appeal is timely, even though the order was entered in the Civil

Docket on the 18th day of May, 1973.

This court refused to consider the order as a civil order of contempt saying it was criminal in nature. Its decision is reported at 501 F. (2) 396.

Appellant then moved before Judge Levet to vacate or resettle his order because he had denominated the order as one for civil contempt. If a civil contempt, it would have been proper for this court to review it as an incident to the appeal from the final judgment in the civil action. As it was, that Judge Levet had called it a civil contempt, was a reason for finding it erroneous, but this court did not and so, appellant sought to have Judge Levet vacate his order as erroneous. Judge Levet denied that motion without once adverting to the fact of his misnaming the order. An appeal was taken from such order of denial. The notice of appeal mentioned this order of denial but not the order of contempt as the order appealed from. The United States attorney argued that no appeal lies from such order of denial which idea was adopted by this court on the oral argument. It affirmed the order appealed from with no opinion. As time to appeal from the contempt order had not yet begun to run this appeal was presented.

POINT 1

THE ORDER APPEALED FROM IS INVALID AND IT IS INSUFFICIENT TO SUPPORT A LAWFUL JUDGMENT OF CONTEMPT.

The order of contempt now under consideration was entered by Judge Levet four days after the trial of the civil suit had ended. He held no hearing on the charges; he filed no specifications of the alleged contemptuous conduct; and yet, his order reads as though it was a final order after a hearing upon an order to show cause upon specifications duly made. This court was misled in assuming that the order was a judgment entered upon an order to show cause why contempt would not be adjudged. The order reads as follows:

"(Caption)

ANTHONY B. CATALDO, an attorney having appeared before this court on May 10, 11 and 17, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney after having been admonished by this court with respect to repeated refusal to obey the direction of the court and repeatedly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May, 1973, it is ADJUDGED that the said Anthony B. Cataldo is guilty of contempt of court, and it is further * * *fined the sum of Fifty ($50.00) Dollars."

There is no truth to the facts recited in said order. There was no hearing on the 11th and 14th days of

May, 1973, on the contempt charge. It fails to state that specifications of the alleged contemptuous conduct of the appellant were served. No specifications were ever given appellant. There was no hearing at any date on any charges of contempt. There is no transcript of any such hearing. The only transcript that exists is of the trial of the civil suit and that trial was held on May 10, 11 and 14, 1973. There was no trial of the contempt charges within the trial proceedings. There was never any order to show cause unless the permission granted during trial to suspend the fine of $50 could be treated as an order to show, but actually, there was no hearing date set and no notice of one given.

The order does not claim that it is made after a summary disposition of contempt during trial. It specifically takes the form of a final order after a duly constituted hearing. It even refers to appellant "having been required to show cause why he should not be held for a civil contempt". There was no such order to show cause and apparently the order entered was not a civil contempt order. It appears to follow the form of the order specified in Rule 42 (b) of the Rules of Criminal Procedure rather than the summary procedure specified in subdivision (a). Subdivision (a) of that rule provides for a certification by the judge "that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court".

Of course, the order in question does not contain any such words.

Nor does the order recite the facts involving the acts of contempt allegedly committed as required by subdivision (a); and though signed, it was not recorded in the criminal docket. While as an order under subdivision (b) there are statements that the kind of contempt charged, are refusal to obey directions and interrupting the court, such action, if they occurred to be contemptuous, (they did not), would have to involve disrespect to or criticizm of the court. If that be so, then there is no proof of such conduct. Besides, Judge Levet was disqualified from sitting. Hence, no order could be made by him, for the same rule says that an order fixing punishment shall enter only after a finding or a verdict entered upon the hearing shall have been made. There was no hearing or verdict or a hearing before a different judge.

Not only was the order erroneous but on its face this criminal contempt order utterly and fatally failed to follow the precepts of Rule 42 above mentioned. See 8a, Moore's Federal Practice, Par. 42.04 [2]; Widger v. U.S., 244 F. (2) 103; and U.S. v. Camil, 497 F. (2) 225. As a summary disposition of the contempt charge, Moore's says at pages 42-30.2 and 42-30.3 that when a summary disposition is attempted after the trial has ended there is no further need to vindicate the court's authority. If the judge,

nevertheless, persists in pressing the order of contempt, his act would suggest a personal vindictiveness.

Again, Moore's under Par. 42.05 discusses the awesome power of a court to hold one for contempt and notes the difference between the use of that power to control the procedural aspects of a trial from the use of it to coerce a party's compliance by threat of punishment.

In Taylor v. Hayes, 418 U.S. 488, the Supreme Court reversed an order, as the present, where it was entered after the trial had ended upon a certification of a summary contempt but the Supreme Court held that such procedure violated due process. The court also said that the trial should proceed before a jury and before a different judge.

Nor may the order be held valid under Rule 42 (b). Made without a hearing or notice deprives appellant of due process; see Taylor v. Hayes, supra, and Cooke v. U.S., 267 U.S. 517. Also in Cooke, the Supreme Court suggests that where the judges' personal feelings are aggrieved by the alleged attack, he should have another judge sit upon the hearing. The requirement of another judge to sit on a contempt hearing is now part of Rule 42 (b). The failure to call in another judge to pass judgment on the issue of contempt was held to be reversible error in U.S. v. Temple, 349 F. (2) 116 and Kasson v. Hughes, 390 F. (2) 183.

Nor are the general allegations of refusing to

obey directions of evidentiary rulings sufficiently descriptive of contempt. It does not allow for the lawful act of an attorney acting in good faith to argue the merits of a court direction affecting the evidence proposed by the lawyer. There was no repetitive disagreement with the same ruling. Once tested and required, whatever ruling was made was followed. Under the guide lines for the trial of the case chosen by the court there were separate rulings on each factual presentation of an item of claimed expense. The judge would rule on each item, frequently without affording plaintiff an opportunity to complete the presentation of all the facts believed necessary. The judge ruled that once he had ruled on one item, no further testimony would be allowed on the subject. And so, the trial was carried on in this fashion, despite the fact that many items were brought up for review upon the trial for the first time. Plaintiff took to making offers of proof which were not allowed, but there was never a repetitive argument on a single ruling.

With all of these procedures, which seemed strange, that a court would not allow facts to interfere with his control of the proceedings, the trial proceedings continued at the same level of activity as the court wished, without interruption or obstruction or cessation by anything that was said and done by appellant.

Also, the words do not describe the "order" said to have been addressed to appellant to desist from arguing

evidentiary rulings. In fact none was made, and the making of such a ruling might be subject to a claim of a denial of due process. Suffice to say that there is no proof of an order by Judge Levet to appellant entered on the record (docket) or in the trial minutes to this effect. Hence, the order of contempt has no support for the statement; see In re LaMarre, 494 F. (2) 753. See also, Edmunds v. Chang, 365 F.S.. 941 where the court delineates an attorney's duty before the court and comparatively delineates the court's function in the court room scene and the limits of his power of contempt. It is a clear exposition of the court-attorney relationship when the court's contempt is used. Mr. Edmunds was seeking to address the court in behalf of his client. The court did not want to hear him at the time but didn't invite the attorney to save his statement to later. Instead, he peremptorily directed the attorney to be seated. Not understanding and being told to sit down when he had an application to make, the attorney tried again to advise the court of the necessity of presenting an issue to the judge. Without further ado, the court held him for contempt. The federal district court held that the court had overstepped the outer limits of his power to hold one in contempt, one who was clearly rightfully appearing before him and was in no way obstructing the orderly procedure of the court. Clearly, the judge's personal taste was the force behing the use of the

contempt power. That, too, was the motivating force of Judge Levet here.

Being concerned with procedural regularity, the Supreme Court in Harris v. U.S., 382 U.S. 162, set aside a conviction of contempt before the court where there was no necessity for it because the failure to answer the question (the direction of the court) had not caused an obstruction in the proceedings of the court, nor had it disrupted the hearing, nor was it threatening the judge. These circumstances together with notice of hearing must be present before the contempt power of the court could be used. Brown v. U.S., 359 U.S. 41, was overruled. This Harris decision was rendered in 1965. It is still in full force and effect. It was the rule in 1973 when Judge Levet was the judge presiding at this trial. Accordingly, he should not have used the power of contempt entrusted to his office unless there was a disturbance of the trial, threatening to disrupt it. As there is no claim that appellant was disorderly in any manner, (in fact, on all the occasions in which appellant sought to have this order reviewed, he claimed to have acted in a dignified manner as befits trial counsel in good standing and there has never been a contradiction offered), Judge Levet could not have made a contempt holding by his order and if he did, he was mistaken.

Also, the claim of disobedience is insufficient for

it does not appear that the disobedience repeated or otherwise was committed with contemptuous intent. Without such intent it is outside the power of the court to use it because there was no occasion to use it. That occasion is the intentional disruption of the proceedings of the court; see In re Brown 454 F. (2) 999. The court said at p. 1003; "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest". Again at p. 1006 the court said; "The foundation for the criminal contempt power is the need to protect the judicial process from wilful impositions, particularly those designed to hobble the machinery of the court". * * * "Not surprisingly, then, one finds that a degree of intentional wrong doing is an ingredient of the offense of criminal contempt." Finding that no intention existed to obstruct justice, the court reversed the order.

See also, 3 Wright, Fed. Prac, & Proc., Cr., Sec. 708; Caldwell v. United States, 28 F. (2) 684; Tauber v. Gordon, 350 F. (2) 843; Pietsche v. Pres. of the U.S., (2 C.A.) 434 F. 861 and U.S. v. Marshal, 451 F. (2) 372. In the Marshall case, the Court of Appeals believed that the conclusory accusations of the certificate were too indefinite to be upheld despite the obvious confusion that existed at that trial. The court reversed. Here there was no confusion in the court room

that prevented the judge from continuing with the trial at the speed of lightning and showing an impatience with appellant's inability to follow the logic of the judge in his findings and being confused with general directions that were difficult to rationalize. Appellant admits to being confused at the proceedings but the judge was not confused one bit. He knew exactly what he wanted to do and did it. If the issue here was to be tried, it would be whether the judge used his power of contempt to insure the early finish of the trial irrespective of the needs of the plaintiff. A reading of the trial transcript will show the judge entering the trial arena instead of remaining aloof, and impatiently interrupting appellant, himself causing obstruction with appellant's presentation of the facts to the extent that he impeded the orderly presentation of plaintiff's case. As it was, appellant dutifully obeyed the judge's directions, as was done by McConnell in In re McConnell, 370 U.S. 230. Nevertheless, Judge Levet dismissed appellant's case, held him for contempt on an invalid certificate and caused him to pay $50 tribute for the privilege of being insulted in the hallowed halls of justice.

POINT 11

APPELLANT IN NO WAY ACTED IN CONTEMPT OF COURT.

If this court finds no intent to obstruct justice or to disrupt the judge's rule of the proceedings at the

trial, it should reverse the order appealed from with costs and without sending the case back for a useless trial. Appellant says that the transcript of the trial will prove that the court, in complete disregard of the rights of the appellant as a plaintiff and as trial counsel, used his power of contempt to coerce appellant into hurrying with the trial to a conclusion, and, in forcing the attorney into a mode of trial believed by the attorney to lead to a failure of proof. Of course, the attorney was the best judge of what facts were available to plaintiff in proof of the issues. When the judge interfered with plaintiff's planned strategy for the proof of plaintiff's case, appellant as plaintiff's lawyer had duty to call the judge's attention to his right to prove the facts he was prepared to prove. The judge refused the offer of proof of facts, but permitted appellant to make his offers of proof in writing after the trial which he did, but the offers were denied. Yet, despite the obedience to such unlawful directions the judge went on to certify appellant for a contempt, which appellant never committed, under an unlawful certificate.

It was said by the Seventh Circuit in U.S. v. Seale, 461 F. (2) 345 at 353: "In Bloom (391 U.S. 194), Mr. Justice White, writing for the court, emphasized the peculiar susceptability of the criminal contempt power to abuse in the hands of judges. * * * It is for this reason that 'despite the important values which the contempt power protects, courts

and legislatures have gradually eroded the power of judges to try contempts of their own authority.' * * * Accordingly, the federal courts have long and consistently articulated the importance of limiting the scope of the judge's authority to punish under the contempt statute in derogation of regular due process procedure." In re Michal, 326 U.S. 224, 227, the Supreme Court found "A Congressional intent to safeguard constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed'. See Anderson v. Dann, 19 U.S. (6 Wheat) 204 (legislative contempt); In re McConnell, 370 U.S. 230, * * *. Similarly, it is because of the power's amenability to subtle, undetectable misuse that 'in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power.' "

As seen above, there must be more than the judge's personal sensibilities affected by the allegedly contemptuous acts. The trial procedures must be adversely affected by the alleged contemptuous conduct. Otherwise, we will have the judge act as prosecutor, party and judge, whenever his wishes might dictate. This would be a result most abhorrent to Americans and it is frustrative of the courts' quest for truth and justice. See In re Little, infra. It was held in the Seale case, supra, that where a judge waits until the

trial is finished to charge a participant for contempt that the judge making the charge shall not sit in judgment on it. It should be referred to another judge for trial. See also Mayberry v. Pennsylvania, 400 U.S. 455.

Furthermore, the Supreme Court later held in, In re Little, 404 U.S. 553, that it is not the violance or the nature of the act of the contemnor that make the act contumaceous but it's affect upon the trial procedures. Do they obstruct or impair the effectiveness of the trial as an instrument of Justice? That is the question. If not, and the alleged contemnor cannot be found to have intended that result upon Justice, the Supreme Court said at p. 555: "the petitioner's statements in summation did not constitute criminal contempt. * * *Therefore, 'the vehemance of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil * * *. The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.' Craig v. Harney, 331 U.S. 367, 376. 'Trial courts. . ., must be on guard against confusing offences to their sensibilities with obstruction to the administration of justice.' Brown v. U.S., 356 U.S. 148, 153 (1958)."

Also in Holt v. Virginia, 381 U.S. 131, where an attorney was held in contempt because he brought a motion for the judge to recuse himself, the Supreme Court reversed, properly distinguishing the peaceful character of making a motion from the act of disrupting orderly procedures. This distinction was reason enough for the judge to disqualify himself from the necessity of finding positive disruption of justice in contempt matters.

Also, in In re McConnell, 370 U.S. 230, the Supreme Court reversed a conviction of a criminal contempt of trial counsel in a case on the ground that what the lawyer was accused of as contumaceous was really a bona fide attempt at preserving for the record the rights of his client. The court said that what had prompted its review of the case was the "importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt" p. 233. Then after reviewing the considerations for adopting the contempt statute, 18 U.S.C. Sec. 401, to confine the use of that power to legitimate ends, the court said at p. 234 "* * * this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business * * * there must be an actual obstruction of justice." The court then took up the specifications of contempt stated in verbatim form from the proceedings on the trial. That showed that the trial court had directed counsel not to make

the offers of proof. Counsel insisted, saying it was the right of counsel to do so, and then remarked that he would "do so unless some bailiff stops me." After this remark, co-counsel moved for a recess which was granted. After the recess, the alleged contemnor did not proceed with his offers of proof. Yet, he was held for contempt for making the threat. The Supreme Court held the mere assertion of an intention that did not interrupt the trial was not an obstruction of the trial. It said "The arguments of a lawyer in presenting his client's cause strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his duty." See the Supreme Court's reiteration of the rule in Mannes v. Meyers, 419 U.S. 449.

In the case at bar, there is nothing in the court's order even remotely descriptive of any action by appellant which prevented Judge Levet from finishing the trial in his own time. Not only that but there are no remarks of the appellant quoted or actions committed by him which disturbed Judge Levet's conduct to be found in the trial record.

Appellant never refused to follow the directions of the court. There are no such incidents in the trial record. Nor did he ever interrupt the court. In this last connection appellant as trial counsel argued points of law or offered evidence in proof of his case and he was told to cease and desist from what he as counsel thought best for

his case, and although he was directed to proceed in a manner which would lead to the defeat of his cause by reason of lack of proof, once the court insisted upon those procedures, appellant followed those directions, and, he lost his case upon an alleged lack of sufficient proof.

In criminal contempt a defendant is proven to be innocent, he must be proved to be guilty beyond a reasonable doubt. See Gompers v. Buck's Stove and Range Co., 221 U.S. 418. Rule 52 of the Federal Rules of Criminal Procedure impels a finding of reversible error because the procedure followed by Judge Levet and his use of the power under the circumstance violated substantial constitutional right of the appellant; see Chapman v. California, 386 U.S. 18 and Kotteakos v. U.S. 328 U.S. 750.

CONCLUSION

The order appealed from should be reversed and the fine remanded with costs.

Respectfully submitted,

Anthony B. Cataldo

ANTHONY B. CATALDO
Attorney pro se

APPENDIX

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APPROPRIATE DOCKET ENTRIES

THERE ARE NO DOCKET ENTRIES IN THE CRIMINAL DOCKET.

ENTRIES IN CIVIL DOCKET 69 Civ. 407 IN CATALDO v. UNITED STATES RELATIVE TO THE ISSUES ON THIS APPEAL.

MAY 18, 1973. ORDER ADJUDGING ANTHONY B. CATALDO FOR CONTEMPT AND LETTER FROM ANTHONY B. CATALDO

LAW OFFICES
ANTHONY B. CATALDO

111 BROADWAY
NEW YORK, N.Y. 10006

962-0965

CABLES LAWSABCAT

May 16, 1973

69 Civ. 407

Cataldo v. U.S.A.

Hon. Richard H. Levet
Judge United States District Court
United States District Court
Foley Square
New York, N.Y. 10007

Dear Sir:

I received the check I was waiting for this morning. I enclose my check to the order of the court for $50. I cannot afford payment of this sum for a cause that is seriously in dispute like this with no benefit in return to boot. I am sure that I showed no contempt for your honor. The only cause you spoke of was that I talked after you had ruled. What actually happened could not justify your assessing a fine. There was no disruption of the proceedings. Approaching the trial, I had assumed the view beforehand that you were a knowledgeable lawyer and a dedicated judge. This led me to believe that you would make the right decision when all the facts were in. Getting the facts in with the many obstacles put in my path was not an easy thing, but I tried. Where is there any undignified conduct exhibited by me?

Your decision on how I was to proceed to put in my case non-plussed me. It was not conducive to the best result for me. Your treatment of the separate items upset me. They were treated contrary to the plain wording of the regulations which I had read and the case law which I had read in preparation for the trial. The part played by your Mr. Madden dismayed me. I shall discuss this at length in my post-trial papers. Had I known of the extent of his participation in the judicial process, I would never have waived the jury.

Altogether there was too much bias against my case. It showed all over. There didn't seem to be anything I could do about it except to carry on stoically making a record as best as I could and as circumstances would permit. Imagine! Several times I was directed not to make an offer of proof. Yet every effort was made without interferring with your honor's prerogatives. In fact, I understood your position.

Before coming to your court I had tried to prove to jaundiced tax reviewers, non-lawyers, that a lawyer has to spend money to attract clients. Friends without need for lawyers will permit a lawyer and his family to starve. I found deaf ears and unsound legal principles being propounded by the auditors. Then an arbitrary assessment was made as expressed by the deficiency notice. I paid to avail myself of the law which provided a people's forum, the district court. Then I found opposing my suit for refund an ambitious young lawyer whose eagerness to make a name for himself led him to make fine distinctions between personal and business that defied the facts. At the trial he went so far as to commit the greatest sin for a lawyer, the presentation of a known untruth on a material point. Your honor did not get that slant of the case. Instead from the beginning you showed your bias against me, assuming that only my adversary could be relied on to tell you the truth and threatening to hold me in contempt if I tried to correct a false statement of fact presented by him. Your remarks about losing the diary and of my having hidden cash reserves which was used to pay off my personal expenses when there were no facts to support either idea and the truth is that I, an honest lawyer, have made only a meager living, disclosed your inner thoughts. These biased remarks I objected to and they should be found in the record. Truly they were unworthy of what I had believed of you.

Really, if I could not tell you the facts, to whom could I tell them or where else could I go? Consequently, I respectfully ask your honor to consider this view point and find it proper and just to remit the penalty.

Sincerely,

lm
Enc.

CONTEMPT ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs,

69 Civil 407

-against-

UNITED STATES OF AMERICA,

Defendant.

- -

- -

IN THE MATTER OF

ANTHONY B. CATALDO,

AN ATTORNEY.

- -

Anthony B. Cataldo, an attorney, having appeared before this court on May 10, 11 and 14, 1973 as pro se attorney and attorney for Ada W. Cataldo, and the said attorney, after having been admonished by this court with respect to repeated refusal to obey the direction of the court and repeatedly having interrupted the court and continuing to argue matters of evidentiary rulings contrary to the direction of the court, having been required to show cause why he should not be held for civil contempt, and after hearing the said Anthony B. Cataldo on the 11th and 14th days of May 1973, it is

ADJUDGED that the said Anthony B. Cataldo is guilty of contempt of court, and it is further

ADJUDGED that the said Anthony B. Cataldo be fined the sum of Fifty ($50.00) Dollars.

Dated: New York, N.Y.
May 18, 1973.

(SGD) RICHARD H. LEVIT
United States District Judge

A TRUE COPY
THOMAS E. ANDREWS, Clerk
By /s/ Deputy Clerk

THOMAS E. ANDREWS,
Clerk

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1973.

(Argued May 30, 1974 Decided June 25, 1974.)

Docket No. 73-2602

ANTHONY B. CATALDO and ADA W. CATALDO,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Levet, *Judge*, denying appellants' claim for an income tax refund.

Affirmed.

ANTHONY B. CATALDO, New York, N. Y., *for appellants and pro se.*

T. GORMAN REILLY, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y.,

A-5

and David P. Land, Assistant United States Attorney, of counsel), *for appellee.*

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Southern District of New York, denying appellants' claim for an income tax refund for the year 1963. Appellants have broadly attacked the decision of the District Court and the fairness of the proceedings before it. We have carefully considered the record and the transcripts of that trial and the briefs submitted to us by the parties and have concluded that appellants were afforded a fair trial and that the District Court did not err in finding for the Government. We therefore affirm.

In the course of the proceedings in the District Court, appellant Anthony B. Cataldo was summoned to show cause why he should not be held in contempt.[1] A judgment so holding was filed on May 18, 1973. Although appellants proffer various arguments attacking the validity of this latter judgment, no appeal has been taken from it and we therefore lack the jurisdiction to undertake its review.

Judgment affirmed.

1 Although Cataldo was summoned to show cause why he should not be held for civil contempt, both appellants and appellee now treat the contempt judgment as if it were criminal in nature and, indeed, it would seem likely in light of the circumstances surrounding it that it was the judge's intent that it should be so construed.

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